Supreme Court, U. S.
FILED
AUG 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1976

No. 76-32

CITY OF BRAINERD, ET AL.,

Appellants,

vs.

MINNESOTA STATE BOARD OF HEALTH
BY WARREN R. LAWSON, M. D.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO AFFIRM AND ALTERNATIVE MOTION TO DISMISS WITH SUPPORTING BRIEF BY APPELLEE

WARREN SPANNAUS
Attorney General
RICHARD B. ALLYN
Solicitor General
RICHARD A. WEXLER
Assistant Attorney General
232 Minnesota Health Dept. Building
717 Delaware Street Southeast
Minneapolis, Minnesota 55440
Telephone: (612) 296-5370
Attorneys for Appellee

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	PAGE
Motion to Affirm and Alternative Motion to Dismiss	1
Statement of the Case	2
Argument	4
Brainerd's Appeal Should Be Dismissed As No Substantial Federal Question is Presented	4
A. This Court has repeatedly ruled in fluoridation cases raising every claim of unconstitutionality here asserted that this health measure presents no substantial federal question	4
B. A substantial federal question is not raised by the Minnesota Supreme Court taking judicial notice of scientific data demonstrating the benefits and safety of water fluoridation	8
C. Prior decisions of this Court support the conclusion that fluoridation does not violate the right to personal privacy	10
Conclusion	15

TABLE OF AUTHORITIES

	PAGE
Minn. Stat. §144.145 (1974)	2
Supreme Court Rule 16(1) (b)	4
Alkire v. Cashman, 477 F.2d 598, cert. denied, 414 U.S. 858 (1973)	6
Attaya v. Town of Gonzales, 192 So.2d 188 (Ct. App. La. 1966)	5
Baer v. City of Bend, 206 Or. 221, 292 P.2d 134 (1956)	5
Birnel v. Town of Fircrest, 53 Wash.2d 830, 335 P.2d 819 (1959), appeal dismissed, 361 U.S. 10 (1959)	5
Breese v. Smith, 501 P.2d 159 (Alas. 1972)	12
Breithaupt v. Abram, 352 U.S. 432, 439 (1957)	12
Chapman v. City of Shreveport, 225 La. 859, 74 So.2d 142 (1954), appeal dismissed, 348 U.S. 892 (1954)	5
City Commission of Fort Pierce v. State ex rel. Altenhoff, 143 So.2d 879 (Ct. App. Fla. 1962), appeal dismissed, 154 So.2d 208 (Ct. App. Fla. 1963)	5
City of Canton v. Whitman, 44 Ohio 62 (1975), appeal dismissed, 96 S.Ct. 1735 (U.S. 1976)	5
Crawford v. City of Detroit, 389 F.2d 1001 (6th Cir. 1968)	5
DeAryan v. Butler, 119 Cal. App.2d 674, 260 P.2d 98 (1953), cert. denied, 347 U.S. 1012 (1954)	7
Dowell v. City of Tulsa, 273 P.2d 859 (Okla. 1954), cert. denied, 348 U.S. 912 (1955)	7
Eisenstadt v. Baird, 405 U.S. 438, 454 (1972)	14
Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311, 315 (1902)	5
Froncek v. City of Milwaukee, 269 Wis. 276, 69 N.W.2d 242 (1955)	5
Graybeal v. McNevin, 439 S.W.2d 323 (Ky. 1969)	5
Griswold v. Connecticut, 381 U.S. 484 (1965)	10
Hall v. Bates, 247 S.C. 511, 148 S.E.2d 345 (1966)	5
Honeyman v. Hanan, 300 U.S. 14 (1937)	4
Jacobson v. Massachusetts, 197 U.S. 11 (1905)	9, 13
Kaul v. City of Chehalis, 45 Wash.2d 616, 277 P.2d 352 (1955)	5
Kraus v. City of Cleveland, 163 Ohio 559, 127 N.E.2d 609 (1955), appeal dismissed, 351 U.S. 935 (1956)	5
Miller v. City of Evansville, 247 Ind. 563, 219 N.E.2d 900 (1966)	5
Minnesota State Board of Health v. The City of Brainerd, —— Minn. ——, 241 N.W.2d 624, —— (1976)	3
MOFF v. State Board of Health and Brainerd	2

PAGE

Ohio ex rel. Eaton v. Price,
360 U.S. 246, 247 (1959) 5
Opinion of the Justices,
243 A.2d 716 (Del. 1968) 5
Paduano v. City of New York,
45 Misc.2d 718, 257 N.Y.D.3f 641, affirmed,
24 App. Div.2d 437, 260 N.Y.S.2d 831 (1965),
affirmed, 17 N.Y.2d 875, 218 N.E.2d 339,
271 N.Y.S.2d 305 (1966), cert. denied,
385 U.S. 1026 (1967) 7
Paris Adult Theatre v. Slaton,
413 U.S. 49, 65, 66 (1973) 11, 12
Ravin v. State of Alaska,
537 P.2d 494 (Alas. 1975) 12
Readey v. St. Louis County Water Co.,
352 S.W.2d 622 (Mo. 1961), appeal dismissed,
371 U.S. 8 (1962) 5
Roe v. Wade, supra at 154 14
Rogowski v. City of Detroit,
374 Mich. 408, 423, 424, 132 N.W.2d 16, 24 (1965) 6
Rogowski v. City of Detroit,
374 Mich. 408, 132 N.W.2d 16 (1965) 5
Schmerber v. California,
384 U.S. 757 (1966) 12
Schuringa v. City of Chicago,
300 Ill.2d 504, 198 N.E.2d 326 (1964),
cert. denied, 379 U.S. 964 (1965) 7
Stanley v. Georgia,
394 U.S. 557 (1969) 11

PAGE

Stroupe v. Eller,
362 N.C. 573, 138 S.E.2d 240 (1964) 5
Teeter v. Municipal City of LaPorte,
236 Ind. 146, 139 N.E.2d 158 (1956) 5
Union Pacific Railway Company v. Botsford,
141 U.S. 250 (1891) 12
Viemeister v. White,
179 N.Y. 235, 72 N.E. 97 (19) 9
Wilson v. City of Council Bluffs,
253 Iowa 162, 110 N.W.2d 569 (1961) 5
Wilson v. City of Mountlake Terrace,
69 Wash.2d 148, 417 P.2d 632 (1966) 5
Zucht v. King,
260 U.S. 176 (1922) 4, 6

IN THE

Supreme Court of the United States

October Term 1976

No. 76-32

CITY OF BRAINERD, ET AL.,

Appellants,

vs.

MINNESOTA STATE BOARD OF HEALTH
BY WARREN R. LAWSON, M. D.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO AFFIRM AND ALTERNATIVE MOTION TO DISMISS WITH SUPPORTING BRIEF BY APPELLEE

MOTION TO AFFIRM AND ALTERNATIVE MOTION TO DISMISS

Minnesota State Board of Health by Warren R. Lawson, M. D., Appellee in the above-entitled cause, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the Supreme Court of Minnesota in the above captioned matter be affirmed and, in the alternative, that the appeal herein be dismissed on the ground that the question presented is so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

With three major exceptions, Appellee Minnesota State Board of Health (hereinafter the "Board") adopts as substantially correct the procedural history contained in the Jurisdictional Statement[1] of Appellant City of Brainerd (hereinafter "Brainerd"). First, the Board takes exception to Brainerd's repeated reference to a special fluoridation election and a meeting called the "Brainerd Convention," held in Brainerd, Minnesota, on July 5, 1974. While such an election and meeting did indeed occur, the Board denies that they have any relevance to the instant appeal. Accordingly, their effect is not addressed at length herein.[2]

Second, Brainerd incorrectly asserts that the issues in *MOFF v. State Board of Health and Brainerd*[3] were limited to whether or not Minn. Stat. §144.145 (1974) (hereinafter the "fluoridation law") was an unlawful exercise of the state police power. Directly in issue and decided against plaintiff

---

[1] Brainerd's Jurisdictional Statement at 5-10 (hereinafter "J.S. at —").

[2] The Minnesota Supreme Court dismissed the Brainerd "constitutional convention" as legally insignificant. Minnesota State Board of Health v. The City of Brainerd, —— Minn. ——, 241 N.W.2d 624, 633 (footnote 5) (1976).

[3] Minnesota District Court, Crow Wing County, No. 37168, Aug. 30, 1973. In this case plaintiff, Minnesotans Opposed to Forced Fluoridation, a non profit corporation consisting of many Brainerd citizens sought an injunction against defendants from enforcing and implementing the fluoridation law and a declaration that it was unconstitutional and that fluoridation constituted pollution.

was the question of whether or not the fluoridation law violated plaintiff's right to privacy.[4]

Finally, Brainerd claims that the majority of the Supreme Court of Minnesota held that a substantial federal question of constitutional privacy was involved. Nowhere in the decision did the majority say the federal question was substantial. To the contrary, the majority stated that "such an infringement, absent any significant adverse consequences to the individual, cannot be accorded substantial weight." *Minnesota State Board of Health v. The City of Brainerd,* —— Minn. ——, ——, 241 N.W.2d 624, 632 (1976).

---

[4] In dismissing this claim the District Court stated:

> However, plaintiff claims . . . that fluoridation constitutes an 'invasion of the right to privacy which is within the penumbra of the Ninth Amendment' to the U.S. Constitution and cites Griswold v. Connecticut, 381 U.S. 479, as authority for such proposition. . . . In the present case, I am not disposed to find M.S. Sec. 144.145 unconstitutional on the basis of Griswold for two reasons: first, I am uncertain as to the precise aspect of the right of privacy which is here involved; and, secondly, it is clear that whatever the precise aspect of the right of privacy may be in this case, it would require some extension or enlargement of the "penumbra" relied upon by the Court in Griswold. . . . Since the present case involves a matter of public health, it relates in my opinion to a social condition . . . and is thus one where even the U.S. Supreme Court would decline to determine the wisdom, need and propriety of the Minnesota legislature's enactment of M.S. 144.145. . . .

See Respondent's Brief and Appendix filed with the Minnesota Supreme Court at RA-20, RA-21.

ARGUMENT

BRAINERD'S APPEAL SHOULD BE DISMISSED AS NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Even though a state court has formally determined a federal question, the United States Supreme Court may nonetheless dismiss an appeal when the question is not substantial. Supreme Court Rule 16(1)(b); *Honeyman v. Hanan*, 300 U.S. 14 (1937); *Zucht v. King*, 260 U.S. 176 (1922). Therefore, the fact *per se* that a federal question was raised and decided in the state court, as was true here, is not determinative. While the Board agrees with Brainerd that a substantial federal question exists only when the issue is consequential, difficult, and not clearly resolved by the established precedents of this Court, contrary to Brainerd's assertion, the issues of this case have been clearly resolved by the established precedents of this Court. Therefore, the Board moves the affirmance of the decision of the Minnesota Supreme Court or dismissal of Brainerd's appeal.

A. This court has repeatedly ruled in fluoridation cases raising every claim of unconstitutionality here asserted that this health measure presents no substantial federal question.

Fluoridation has been practiced in the United States as a public health measure for approximately thirty years with about 100 million people in the United States presently consuming municipally fluoridated water. During this period, the constitutionality of fluoridation has been repeatedly chal-

lenged. Both state and federal courts have rejected these attacks with complete unanimity.[5]

Of the eleven cases where the United States Supreme Court declined to review state supreme court decisions upholding the constitutionality of fluoridation, five were direct appeals dismissed for want of a substantial federal question. *City of Canton v. Whitman*, 44 Ohio St.2d 62 (1975), *appeal dismissed*, 96 S.Ct. 1735 (U.S. 1976), *Readey v. St. Louis County Water Co.*, 352 S.W.2d 622 (Mo. 1961), *appeal dismissed*, 371 U.S. 8 (1962); *Birnel v. Town of Fircrest*, 53 Wash.2d 830, 335 P.2d 819 (1959), *appeal dismissed*, 361 U.S. 10 (1959); *Kraus v. City of Cleveland*, 163 Ohio 559, 127 N.E.2d 609 (1955), *appeal dismissed*, 351 U.S. 935 (1956); *Chapman v. City of Shreveport*, 225 La. 859, 74 So.2d 142 (1954), *appeal dismissed*, 348 U.S. 892 (1954). The dismissals in these cases are decisions on the merits. *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311, 315 (1902). In these cases, every claim of unconstitutionality asserted by Brainerd was presented to this Court. Appellants in *Chapman*, *Kraus*, and *Birnel*, *supra*,

---

[5] The cases for which review by this Court either by direct appeal or by writ of certiorari have not been sought are:
Graybeal v. McNevin, 439 S.W.2d 323 (Ky. 1969); Opinion of the Justices, 243 A.2d 716 (Del. 1968); Crawford v. City of Detroit, 389 F.2d 1001 (6th Cir. 1968); Attaya v. Town of Gonzales, 192 So.2d 188 (Ct. App. La. 1966); Hall v. Bates, 247 S.C. 511, 148 S.E.2d 345 (1966); Wilson v. City of Mountlake Terrace, 69 Wash. 2d 148, 417 P.2d 632 (1966); Miller v. City of Evansville, 247 Ind. 563, 219 N.E.2d 900 (1966); Rogowski v. City of Detroit, 374 Mich. 408, 132 N.W.2d 16 (1965); Stroupe v. Eller, 362 N.C. 573, 138 S.E.2d 240 (1964); City Commission of Fort Pierce v. State ex rel. Altenhoff, 143 So.2d 879 (Ct. App. Fa. 1962), appeal dismissed, 154 So.2d 208 (Ct. App. Fla. 1963); Wilson v. City of Council Bluffs, 253 Iowa 162, 110 N.W.2d 569 (1961); Teeter v. Municipal City of LaPorte, 236 Ind. 146, 139 N.E.2d 158 (1956); Baer v. City of Bend, 206 Or. 221, 292 P.2d 134 (1956); Kaul v. City of Chehalis, 45 Wash. 2d 616, 277 P.2d 352 (1955); Froncek v. City of Milwaukee, 269 Wis. 276, 69 N.W.2d 242 (1955).

alleged *inter alia* that fluoridation of municipal water supplies was unconstitutional because (a) it constitutes compulsory medication;[6] (b) it is or may be harmful to health;[7] (c) it is directed against a noncontagious disease;[8] and (d) allegedly alternative methods of administering fluoride to children are available.[9] In the instant matter Brainerd argues that fluoridation violates the right of its citizens to personal privacy and bodily integrity in contravention of the Fourteenth Amendment of the United States Constitution. However, Brainerd's argument is simply a rewording of the compulsory medication and related arguments listed above which this Court has found in *Birnel, Kraus* and *Chapman, supra,* do not constitute a substantial federal question.

In addition, this court denied certiorari in six cases wherein the constitutionality of fluoridation was upheld by highest state courts. *City of Canton v. Whitman, supra; Alkire v. Cash-*

[6] See the jurisdictional statements of Chapman, pp. 4, 6-7; Kraus, pp. 4, 10; and Birnel, p. 4.

[7] See the jurisdictional statements of Chapman, pp. 4, 6; Kraus, p. 10; and Birnel, pp. 6-7.

[8] See the jurisdictional statements of Chapman, p. 4; Krause, p. 22; and Birnel, p. 10. With respect to this issue, the Supreme Court of the State of Michigan has stated:

> . . . It is true that the smallpox disease involved in [Jacobson v. Massachusetts, 197 U.S. 11 (1905)] is infectious or contagious while dental caries is not. Plaintiffs cite no cases to the effect that element is essential to the power of the State to adopt and enforce regulations designed to protect or improve public health. We conceive of no sound reason for so holding.

Rogowski v. City of Detroit, 374 Mich. 408, 423, 424, 132 N.W.2d 16, 24 (1965). Brainerd also fails to cite any cases supporting this contention. In fact Brainerd cites with approval Zucht v. King, 260 U.S. 174 (1922). Zucht involved a challenge to a compulsory vaccination law in which plaintiff alleged, *inter alia*, that there was *no occasion for requiring vaccination*. In other words, plaintiff claimed that under the existing circumstances vaccination was not necessary to prevent contagious disease. Defendants filed a general demur the effect of which is to admit all facts alleged by plaintiff. This Court found notwithstanding that the vaccination requirement was not needed that no substantial federal question was involved.

[9] See the jurisdictional statements of Kraus, p. 11, and Birnel, p. 7, 9.

man, 477 F.2d 598, *cert. denied,* 414 U.S. 858 (1973); *Paduano v. City of New York,* 45 Misc.2d 718, 257 N.Y.S.2d 531, *affirmed,* 24 App. Div.2d 437, 260 N.Y.S.2d 831 (1965), *affirmed,* 17 N.Y.2d 875, 218 N.E.2d 339, 271 N.Y.S.2d 305 (1966), *cert. denied,* 385 U.S. 1026 (1967); *Schuringa v. City of Chicago,* 300 Ill.2d 504, 198 N.E.2d 326 (1964), *cert. denied,* 379 U.S. 964 (1965); *DeAryan v. Butler,* 119 Cal. App.2d 674, 260 P.2d [illegible] (1953), *cert. denied,* 347 U.S. 1012 (1954); *Dowell v. City of Tulsa,* 273 P.2d 859 (Okla. 1954), *cert. denied,* 348 U.S. 912 (1955). The petitioners in these cases argued unsuccessfully every question of constitutionality raised by Brainerd. *Alkire* and *Paduano, supra,* directly raised the question of whether fluoridation violated the right to privacy.[10] By denying the writs of certiorari, this Court found in essence that the privacy question in the fluoridation context was insubstantial.[11]

As the foregoing dramatically demonstrates, Brainerd is totally and completely incorrect when it asserts that plaintiffs in these cases,

> . . . could not be heard to claim that the statute interferes with the inherent privacy rights of the individuals

[10] See pp. 2, 8-10 of Alkire's Petition for Writ of Certiorari. In Paduano the New York Court of Appeals held that the "fluoridation program does not constitute a significant invasion of fundamental rights." 18 N.Y.2d 721, 220 N.E.2d 803, 274 N.Y.S.2d 158 (1966). This issue was raised then in the Petition for a Writ of Certiorari, pp. 4, 6, 7, 13-23.

[11] The other questions raised by these cases were, with page references to the petitions for certiorari:

(1) Compulsory medication, Alkire, p. 8, Paduano, p. 3, Schuringa, pp. 2-3, DeAryan, p. 8, Dowell, pp. 2-3;

(2) Alleged dangers to health, Alkire, p. 8, Paduano, p. 3, Schuringa, pp. 2-3;

(3) Alleged want of power to act against non-contagious disease, Alkire, p. 8, Paduano, p. 3, Dowell, pp. 2-3;

(4) Alleged lock of power because of absence of a public emergency endangering health, Alkire, p. 8, Paduano, p. 4, Schuringa, pp. 2-3, Dowell, pp. 2-3.

(5) Alleged availability of other methods of protecting teeth, Alkire, pp. 8, 9; Paduano, p. 3.

> living in the community . . . [T]here is no standing to claim that the inherent privacy rights of individuals are violated by a statute, unless and until the statute is about to be enforced against an individual or group of individuals who expressly protest.[12]

Brainerd, seeking to somehow create grounds on which to distinguish its case from the unbroken line of decisions rejecting the relief they want, refers to the so-called "Brainerd convention." This meeting was allegedly a protest of the people which somehow gives Brainerd a special standing to present an issue not heretofore considered by this Court. The contention should be to no avail as the "convention" has no legal significance. In the privacy cases previously decided by this Court, the individual plaintiffs did not have to call a constitutional convention to protest the law in question in order to gain standing to challenge the law in court. The filing of a suit in itself constitutes the protest.

B. A substantial federal question is not raised by the Minnesota Supreme Court taking judicial notice of scientific data demonstrating the benefits and safety of water fluoridation.

Brainerd asserts that the Minnesota Supreme Court took judicial notice of scientific evidence demonstrating the safety and benefits of fluoridation while at the same time ignoring evidence to the contrary. Brainerd goes on to refer and even delineate much of this anti-fluoridation evidence in its Jurisdictional Statement.[13] It is plain that Brainerd, through extraordinary use of facts outside the record, is asking the Court

[12] J.S. at 12, 13.
[13] J.S. at 5, 17-24.

to perform a legislative function to decide between two competing philosophical beliefs and sets of data.[14]

The question of inconsistent scientific evidence should not be resolved in the United States Supreme Court. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Viemeister v. White*, 179 N.Y. 235, 72 N.E. 97 (1904).

> . . . The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good.
>
> It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. . . .
>
> A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. . . .
>
> The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. *The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases.* In

[14] While the Board is aware of the existence of the data presented by Brainerd which it uses to support its position that fluoridation may be harmful, the Board denies its validity. Further, the great weight of medical opinion continues to grow in support of the benefits and safety of this proven public health measure.

> a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a republican form of government. . . .

Jacobson v. Massachusetts, supra, at 34, 35 (emphasis added).

This Court has unequivocally held that a court may take judicial notice of a common knowledge or belief, such as here, that fluoridation is beneficial to prevent dental caries and thus is a significantly important public health measure. The existence of those in society who hold a contrary opinion with respect to the benefit of fluoridation does not change this rule. It only establishes the fluoridation question as one to be determined legislatively, not judicially. The judicial notice question raised by Brainerd is not substantial nor is it even a federal question. It does not provide a basis for this Court to take jurisdiction of this case.

C. Prior decisions of this court support the conclusion that fluoridation does not violate the right to personal privacy.

Brainerd contends that the fluoridation law violates an inherent constitutional right of the people to privacy, health, freedom, and bodily integrity. As has been noted, *supra* at 7-8, this Court has rejected the claim that fluoridation violates these rights. That action is entirely consistent with the decisions of this Court, including those issued since the initial enunciation of the modern right to privacy doctrine in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In *Griswold, supra,* this Court declared unconstitutional a Connecticut state law which forbid the use of and the giving of advice with respect to the use of contraceptives. The statute was found to violate the right of "privacy and repose" which emanated from the penumbra of the Bill of Rights. In so doing, this Court did not declare that every law which intruded on an individual's life was invalid. Indeed, even the *Griswold* Court admitted that it was not a legislative body responsible for determining the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *Id.* at 482. The Connecticut law, however, went beyond these legitimate areas of state concern and intruded into the sacred relationship of marriage.

Since *Griswold* this Court has continued to carve out a right of autonomy for the individual but in very limited areas all involving personal decisions which do not directly affect the public.[15] Thus, the right of privacy that exists under the Fourteenth Amendment includes:

> "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' *Palko v. Connecticut,* 302 U.S. 319, 325 (1937);" *Roe v. Wade,* 410 U.S. 113, 152 (1973). This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. cf. *Eisenstadt v. Baird,* 405 U.S. 438, 453-454 (1972); . . . *Stanley v. Georgia,* . . . [394 U.S. 557 (1969)]; *Loving v. Virginia,* 388 U.S. 1, 12 (1967); *Griswold v. Connecticut,* . . . [381 U.S. 479 (1965)]; *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942); *Pierce v. Society of Sisters,* 268 U.S. 510, 535

[15] Compare Stanley v. Georgia, 394 U.S. 557 (1969), with Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

(1925); and *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923).[16]

Paris Adult Theatre v. Slaton, 413 U.S. 49, 65, 66 (1973).

What Brainerd ignores is that most aspects of a person's life do not involve fundamental personal rights. In these instances the individual's liberty is subject to the police power of government, with presumptions of statutory validity and a heavy burden placed on that person who claims that a regulation has no conceivable public purpose or that there is no rational relation between means and ends. One such area where an individual must conform to the declarations of government and where no fundamental rights are involved is in public health measures. Fundamental to a strong and viable nation is a healthy people. In recognition, this Court has long preserved the right of state legislatures to enact reasonable laws to protect the public health, even if they do intrude upon an individual's bodily integrity. As stated in *Breithaupt v. Abram,* 352 U.S. 432, 439 (1957): "As against the right of an individual that his person be held inviolable . . . must be set the interests of society . . ."[17] Thus in *Schmerber v. California,* 384 U.S. 757 (1966), a case involving a governmental intrusion into an individual's body for blood to be analyzed

[16] The areas protected in these cases are marriage, contraception, miscegenation, sterilization, family relations, possession of obscene materials in one's own home, child rearing, and education.

[17] See also Roe v. Wade, 410 U.S. 113, 154 (1973) where the Court concluded that the right of personal privacy ". . . is not unqualified and must be considered against important state interests in regulation." The cases cited by Brainerd are inapposite. For example, Breese v. Smith, 501 P.2d 159 (Alas. 1972), and Ravin v. State of Alaska, 537 P.2d 494 (Alas. 1975) were both decided under provisions of the Alaska constitution, not the United States constitution. Union Pacific Railway Comp. v. Botsford, 141 U.S. 250 (1891), and Mohr v. Williams, 95 Minn. 265, 101 N.W. 12 (1905) do not involve the validity of state public health regulation but instead deal with rights between private parties.

for alcohol content, this Court concluded that the constitution does not protect an individual "against all intrusions," but only "against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Id.* at 768.

Other declarations of the Court are entirely consistent with these more recent statements. In *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), this Court upheld a compulsory vaccination law against the charge that it was

> unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.

197 U.S. at 26. In response thereto, this Court stated:

> . . . [T]*he liberty secured by the Constitution of the United States to every person within its jurisdiction does not impart an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.* There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that

'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.' [Citations omitted.] In Crowley v. Christensen, 137 U.S. 86, 89, we said: *'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.* Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. 197 U.S. at 26, 27[18] (emphasis added).

As is clear from the above discussion, there is no conflict in the opinions of this Court. There exists a constitutional right of privacy or personal autonomy which is operative only when government attempts to intrude into areas of an individual's life which are uniquely personal and nonpublic. However, even here the right is not absolute and the government may regulate those aspects of life if compelling reasons exist. There are, in addition, other areas of an individual's life which may be subordinated to the interests of government for the public good. In these instances the right of privacy is not even in issue, and the only valid question is whether government has properly exercised its police power. Laws, such as Minnesota's fluoridation law, enacted in furtherance of the public health on the basis that fluoride will materially reduce the in-

[18] Jacobson is still good law. Roe v. Wade, *supra* at 154; Eisenstadt v. Baird, 405 U.S. 438, 454 (1972).

cidence of dental decay, an acknowledged serious health problem, fall into this latter category. The decision of the Minnesota Supreme Court in the instant action, being totally consistent with this Court's prior decisions, raises no issues to justify this Court noting jurisdiction of the case.

CONCLUSION

For the foregoing reasons, the Board urges this Court to affirm the decision of the Minnesota Supreme Court, or in the alternative, to dismiss Brainerd's appeal for want of a substantial federal question.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
RICHARD B. ALLYN
Solicitor General
RICHARD A. WEXLER
Assistant Attorney General
232 Minnesota Health Dept. Building
717 Delaware Street Southeast
Minneapolis, Minnesota 55440
Telephone: (612) 296-5370
Attorneys for Appellee